Supreme Court, U.S.
FILED
APR 2 2002
CLERK

(5)

No. 01-929

In the Supreme Court of the United States

DAIMLERCHRYSLER AKTIENGESELLSCHAFT,

Petitioner,

v.

SCOTT OLSON, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF KAREN L. OLSON, AND VICKIE OLSON,

Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals, Third Appellate District

---

REPLY BRIEF FOR PETITIONER

JUSTS N. KARLSONS
DAVID M. RICE
MATTHEW J. KEMNER
Carroll, Burdick & McDonough LLP
44 Montgomery Street
Suite 400
San Francisco, CA 94104
(415) 989-5900

ALAN E. UNTEREINER*
ROY T. ENGLERT, JR.
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

(Additional Counsel Listed on Inside Cover)

1608

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. This Court Has Jurisdiction 1

II. This Case Is An Excellent Vehicle 4

III. The Decision Below Is Wrong 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases:

Adams v. *Robertson*, 520 U.S. 83 (1997) 3

American Type Culture Collection, Inc. v. *Coleman*, 45 TEX. SUP. CT. J. 107 (Nov. 17, 2001) 9

Asahi Metal Industry Co. v. *Superior Court of California*, 480 U.S. 102 (1987) 8

Baker v. *Mercedes Benz of North America*, 114 F.3d 57 (5th Cir. 1997) 10

BMC Software Belgium, N.V. v. *Marchand*, 44 TEX. SUP. CT. J. 577 (April 7, 2001) 9

Calder v. *Jones*, 465 U.S. 783 (1984) 2

Cannon Mfg. Co. v. *Cudahy Packing Co.*, 267 U.S. 333 (1925) 4, 8

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 1, 2

Fisher v. *District Court*, 424 U.S. 382 (1976) 3

GTE New Media Services, Inc. v. *BellSouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000) 6, 7

Guardian Royal Exch. Assurance, Ltd. v. *English China Clays, P.L.C.*, 815 S.W.2d 223 (Tex. 1991) 8, 9

IKB Indus. v. *Pro-Line Corp.*, 938 S.W.2d 440 (Tex. 1997) 4

TABLE OF AUTHORITIES—Continued

Page(s)

Kawasaki Steel Corp. v. *Middleton*,
699 S.W.2d 199 (Tex. 1985) 5

LeBlanc v. *State*, 826 S.W.2d 640
(Tex. App. – Houston [14th Dist.] 1992) 2

Mercantile Nat'l Bank v. *Langdeau*,
371 U.S. 555 (1963) 2

Michigan v. *Tyler*, 436 U.S. 499 (1978) 3

Mink v. *AAAA Development LLC*,
190 F.3d 333 (5th Cir. 1999) 7

Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 1, 2

Rosenblatt v. *American Cyanamid Co.*,
86 S. Ct. 1 (1965) 1

Scott v. *Huey L. Cheramie, Inc.*, 833 S.W.2d 240
(Tex. App. – Houston [14th Dist.] 1992, no writ) 5

United States v. *Williams*, 504 U.S. 36 (1992) 5

World-Wide Volkswagen Corp. v. *Woodson*,
444 U.S. 286 (1980) 2

Ylst v. *Nunnemaker*, 501 U.S. 797 (1991) 3

Zippo Mfg. Co. v. *Zippo Dot Com, Inc.*,
952 F. Supp. 1119 (W.D. Pa. 1997) 6, 7

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes and Rule:

28 U.S.C. § 1257(a) 1, 2, 3

TEX. GOV'T CODE ANN. § 22.001(a)(2) 3

TEX. GOV'T CODE ANN. § 22.225(c) 3

TEX. R. APP. P. 28.1 4

Miscellaneous:

52 AM. JUR. 2d, *Mandamus* (2000) 3

3 R. CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES (1998) 7

STERN, GRESSMAN, *ET AL.*, SUPREME COURT PRACTICE (7th ed. 1993) 2

REPLY BRIEF FOR PETITIONER

Respondents do not dispute the existence of any of the serious conflicts in the lower courts we have identified: conflicts over the "stream of commerce" theory (Pet. 12-14); the analysis of Internet contacts (*id.* at 15-17); the imputation of forum contacts to corporate affiliates (*id.* at 18-21); the relevance of trademark use and national advertising to the "minimum contacts" analysis (*id.* at 17-18); and the standards for evaluating "fair play and substantial justice" (*id.* at 22-24). Nor do respondents deny that, on a grant of review, they would seek to defend the judgment below by making an argument for *specific* jurisdiction that would allow this Court to resolve a deep and worsening conflict over the meaning of "relatedness" (Pet. 28-30). As the *amicus* briefs confirm, there is a compelling need for guidance as to the due process limits on the assertion of *general* jurisdiction by the state courts. Pet. 9-12. Respondents admit that the important issues raised by this case are recurring. Opp. 3.

Respondents try to sow doubt about this Court's jurisdiction and whether this case is a good vehicle to resolve the certworthy issues it raises; and they make a modest attempt to defend the result below. Those arguments are all unavailing.

I. This Court Has Jurisdiction

A. This case falls within the "fourth" category of cases recognized in *Cox Broadcasting* as an exception to the "finality" requirement of 28 U.S.C. § 1257(a). *Cox*, 420 U.S. at 482-83. The federal issue has been finally decided in the Texas courts and Daimler-Benz AG might prevail on the merits on nonfederal grounds in further proceedings; reversal by this Court "would be preclusive of any further litigation on the relevant cause of action" against Daimler-Benz AG; and "a refusal immediately to review the state court decision might seriously erode federal [due process] policy." *Ibid.*; accord *Rosenblatt* v. *American Cyanamid Co.*, 86 S. Ct. 1, 2-3 (1965) (Goldberg, J., in chambers). The constitutional protection against being compelled to defend a lawsuit in a forum where one lacks minimum contacts would be worth little if it could be vindicated only following a full trial and entry of a final judgment. Cf. *Mitchell* v. *Forsyth*, 472 U.S.

511, 526 (1985). See also *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963) (exercising review of state court's interlocutory resolution of threshold venue issue).[1]

Respondents argue, however, that this Court lacks jurisdiction because the Texas Court of Appeals' decision is not the "final word of a final [state] court." Opp. 4. But the *Cox* exceptions are precisely that: *exceptions* to the usual requirement of strict finality. Equally incorrect is respondents' suggestion that jurisdiction is defeated under 28 U.S.C. § 1257(a) because in theory "the state courts may review again the federal questions presented." Opp. 5. Respondents overstate (Opp. 5, 7) the freedom of the Texas courts to revisit the due process issue. See *LeBlanc* v. *State*, 826 S.W.2d 640, 644 (Tex. App. – Houston [14th Dist.] 1992) (law-of-the-case doctrine bars relitigation in all but "exceptional or urgent situations"). More important, in cases such as *World-Wide Volkswagen* and *Cox*, the petitioners also remained free to renew their arguments at trial and on appeal, yet this Court exercised jurisdiction.

Respondents contend that this case is different because the Texas Supreme Court did not resolve the personal jurisdiction issue on the merits but rather dismissed a petition for review for lack of jurisdiction. Opp. 5-6. The requirement of a decision "by the highest court of a State in which a decision could be had" (28 U.S.C. § 1257(a)), however, "does not necessarily mean that a decision must be rendered by the state court of last resort." STERN, GRESSMAN, *ET AL.*, SUPREME COURT PRACTICE 111 (7th ed. 1993). "It means only that there must be a judgment by the highest state court having jurisdiction over the case at the time the decision was rendered and the jurisdiction of the Supreme Court invoked." *Ibid.* That requirement was satisfied here.[2]

---

[1] As respondents correctly point out (Opp. 7), this Court's jurisdiction in *Calder* v. *Jones* may have rested on the "third" *Cox* exception, since in that case "later review of the federal issue c[ould] not be had" in the California courts. 420 U.S. at 481. Contrary to respondents' suggestion, however, this requirement does not apply to the fourth *Cox* exception.

[2] As respondents acknowledged below, the Texas Supreme Court has jurisdiction to review any interlocutory decision that conflicts with another Texas

B. In any event, this Court has jurisdiction because the Texas Supreme Court's denial of Daimler-Benz AG's mandamus petition plainly qualifies as a "final decision" within the meaning of Section 1257(a). See Pet. 1-2 (citing authorities). It is irrelevant that the denial of mandamus in this case "has not ended the litigation." Opp. 8. "A judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final even if further proceedings are to be had in the lower courts." *Fisher* v. *District Court*, 424 U.S. 382, 385 n.7 (1976).

Equally mistaken is respondents' suggestion (Opp. 8-9) that an "adequate and independent" state ground exists for denial of mandamus because, under Texas law, mandamus is not available if there is an adequate remedy at law. That argument proves too much. Mandamus "will generally not issue if another adequate and complete method of relief, either legal or equitable, is available." 52 AM. JUR. 2d, *Mandamus* § 31, at 297 (2000) (footnotes omitted). Thus, if respondents were correct, this Court would *never* have jurisdiction to review an order of a state supreme court summarily denying a petition for mandamus.

Respondents are wrong to suggest that the Texas Supreme Court's unexplained denial of the mandamus petition (Pet. App. 30a) must be presumed to rest on adequate and independent state-law grounds. See *Ylst* v. *Nunnemaker*, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment *or rejecting the same claim* [are presumed to] rest upon the same ground.") (emphasis added). Respondents' reliance on *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997), and *Michigan* v. *Tyler*, 436 U.S. 499, 512 n.7 (1978), is misplaced because those cases deal with situations where petitioners did not properly present the federal issue to the state courts.

---

appellate decision. TEX. GOV'T CODE ANN. §§ 22.001(a)(2), 22.225(c). Thus, in dismissing for lack of jurisdiction, the Texas Supreme Court necessarily determined that the Court of Appeals' decision in this case was entirely consistent with Texas's view of due process.

II. This Case Is An Excellent Vehicle

Respondents would like this Court to believe that the Texas courts had no fair opportunity to pass on many arguments in the petition and that the facts relevant to jurisdiction are messy, complex, and disputed. Nothing could be further from the truth.

A. Virtually all of the jurisdictional facts were established by a *stipulation* entered into by the parties (see Pet. App. 52a-60a). Beyond that, the parties presented three short affidavits (*e.g.*, *id.* at 46a-51a) together with a modest amount of documentary evidence. No witnesses testified. The parties' disagreements center on the *legal significance* of certain undisputed provisions or statements made in the distribution agreement, the corporate reports, or the *Moghimi* complaint. See Opp. 11-13; see also Chamber *Amicus* Br. 6-7.

Respondents nevertheless repeatedly suggest that "significant factual disputes" will prevent the Court from "reaching most of the legal issues" raised in the petition. Opp. 3, 10.[3] But nothing turns on most of the supposed factual "disputes" they identify. For example, even if this Court agrees with the Court of Appeals' expansive interpretation of certain language in Daimler-Benz AG's annual reports (see Opp. 11), there would *still* be no basis to attribute MBNA's activities to Daimler-Benz AG under either *Cannon* or traditional "alter ego" principles. The same is true for the question whether MBNA takes title to models of vehicles *other than the 500SE* in Germany or in the United States. Opp. 12. And, of course, it was the lower court's *endorsement* of the principle that trademark use is akin to advertising (Opp. 12-13) that *gives rise* to one of the conflicts raised by this case. Pet. 17-18. There is no impediment to this Court's

---

[3] Respondents fault us for not requesting findings of fact and assert that the absence of findings required a deferential standard of appellate review. Opp 2. This is more smoke and mirrors. Under Texas law, a trial court "need not" prepare findings of fact in connection with an appealable interlocutory order, even if the appellant requests them. TEX. R. APP. P. 28.1; see also *IKB Indus.* v. *Pro-Line Corp.*, 938 S.W.2d 440, 442-43 (Tex. 1997). And Texas courts do not give the same deference to findings of fact made in support of an interlocutory order that does not go to the merits of a claim that they give to the required findings following a bench trial. *IKB Indus.*, 938 S.W.2d at 442.

reaching, and resolving, the issues presented on this record.[4]

B. Moreover, the question of personal jurisdiction was *exhaustively* litigated in the lower courts. For six years, that issue has been the central focus of litigation in Texas, and the parties submitted more than 400 pages of briefing in the intermediate appellate court and Texas Supreme Court.[5] This Court may review any issue that was either raised in or decided by the court below. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992). The Texas Court of Appeals squarely decided the *issue* presented in this case: whether Texas's assertion of *in personam* general jurisdiction over Daimler-Benz AG comports with the Due Process Clause of the Fourteenth Amendment. As respondents admit (Opp. 17), this Court has never required that every *argument* on an issue presented be raised below.

C. 1. *The "Stream of Commerce" Theory.* Whatever its precise contours, the "stream of commerce" theory is relevant *only* to questions of *specific* jurisdiction. Yet the Court of Appeals repeatedly invoked Daimler-Benz AG's placement of "a large volume of vehicles into a stream of commerce destined for the United States" (Pet. App. 27a) in rendering a decision that by its terms was limited to general jurisdiction. *Id.* at 26a.

Respondents maintain that the Court of Appeals' repeated mention of the "stream of commerce" and the volume of other

---

[4] Respondents suggest (Opp. 1-2) that this case presents factual complexities because, under Texas law, Daimler-Benz AG bore the burden of negating "all bases of personal jurisdiction." *Kawasaki Steel Corp.* v. *Middleton*, 699 S.W.2d 199, 203 (Tex. 1985). That standard, however, "does not mean the [defendant] must negate every possible ground in the universe, but rather the acts in Texas alleged by the [plaintiff] to support personal jurisdiction." *Scott* v. *Huey L. Cheramie, Inc.*, 833 S.W.2d 240, 241 (Tex. App. – Houston [14th Dist.] 1992, no writ). The only basis for personal jurisdiction alleged by respondents in the trial court was "stream of commerce." CR 1408-18.

[5] To be sure, certain aspects of the decision below (such as its reliance on the Daimler-Benz AG annual reports and provisions of MBNA's distribution agreement to show that MBNA was the alter ego of Daimler-Benz AG) were *not* challenged until the rehearing stage in the Court of Appeals. But the reason for that is simple: respondents *disavowed* any reliance on the alter ego doctrine in their brief in the Court of Appeals (at 27).

Mercedes vehicles sold in the U.S. was entirely gratuitous. That is wishful thinking. Stream of commerce has always been the centerpiece of respondents' novel jurisdictional theory. They repeatedly urged the lower courts to rely on this factor despite Daimler-Benz AG's argument that it was irrelevant to general jurisdiction. Indeed, even in *this* Court respondents are relying on the stream-of-commerce theory in defending the exercise of general jurisdiction. Opp. 26-27. Although the Court of Appeals erroneously relied upon certain grounds respondents never urged, it plainly relied upon the stream-of-commerce theory.[6]

2. *Internet Contacts.* Respondents assert that Daimler-Benz AG "never suggested" in the lower courts that something other than the *Zippo* framework "should be used" to analyze Internet contacts and never has "taken a position" on what the proper test is. Opp. 16, 17. They are wrong on both counts. Daimler-Benz AG raised this issue in the first court (the Texas Supreme Court) that had the authority to reject the *Zippo* framework;[7] and its opening merits brief in the Texas Supreme Court specifically identified (at 27-32) the conflict between *Zippo* and the D.C. Circuit's decision in *GTE New Media*. Moreover, Daimler-Benz AG explained in its Texas Supreme Court brief (at 31) that the *Zippo* test is inferior to the approach of *GTE New Media* because "[m]ere interactivity does not satisfy the due process inquiry." See also Pet. 25-26 (arguing that *Zippo* is wrong). Respondents' suggestion that it is "unknown" whether they will

---

[6] See, *e.g.*, Pet. App. 11a (emphasizing that although the accident vehicle "was not marketed in or placed by Daimler-Benz in a stream of commerce destined for the U.S., * * * Daimler-Benz does, however, design, manufacture, and sell vehicles in a stream of commerce intended for the U.S. market, including the state of Texas"); *id.* at 27a (relying on stream of commerce in connection with the "fair play and substantial justice" factors); *id.* at 12a-13a (noting that "[n]umerous Mercedes-Benz cars * * * have been * * * furnished under these [trade]marks by authorized dealers in Texas"); *id.* at 19a (discussing U.S. sales of Mercedes vehicles); *id.* at 1a, 2a-3a, 18a.

[7] The Texas Court of Appeals had already adopted the *Zippo* framework. See Pet. App. 25a. Moreover, at the time Daimler-Benz AG's briefs were filed in the Court of Appeals, the D.C. Circuit had not yet issued its decision in *GTE New Media* – the first appellate decision to expressly reject *Zippo*.

"even clash on this issue" is disingenuous at best because, under the *GTE New Media* approach, no weight would be accorded to the Daimler-Benz AG website.

Respondents fare no better in vaguely complaining that "the record is not fully developed" with respect to the Daimler-Benz AG website. Opp. 18. The basic facts concerning the website were established by the stipulation. See Pet. App. 24a, 57a. Respondents themselves submitted an affidavit about the website. If these submissions were inadequate to establish some relevant aspect of the website (which respondents have failed to specify), they have only themselves to blame.[8]

3. *The Federal Trademark Action.* Respondents emphasize that Daimler-Benz AG alleged in a federal complaint that it had "used" its trademarks and service marks "to identify and distinguish" its cars in Texas. Opp. 20. Since the basic function of *any* trademark is to "identify" a product's origins and "distinguish" it from competing products, Daimler-Benz AG's "admission" applies with equal force to *any* foreign company that manufactures a trademarked product that regularly finds its way into a distant forum. If this were enough to subject a foreign manufacturer to *general* jurisdiction, then jurisdiction would truly follow a trademarked product wherever it traveled.

Respondents also suggest that Daimler-Benz AG's allegation about trademark use was "overly-broad." (Opp. 22). But to state a valid claim for trademark infringement, the trademark owner must allege that the mark has been *used continuously* to identify its product within the forum. 3 R. CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES §§ 19.01, 19.07 (1998); Pet. 27 n.7. Those are precisely the allegations the lower court thought constituted "advertising" and do-

---

[8] Respondents suggest various differences between this case and the Fifth Circuit's decision in *Mink*, see Opp. 18-19, but those differences in no way detract from our point: *Mink* adopts a far more restrictive understanding of the intermediate *Zippo* category than did the Texas Court of Appeals in this case. Pet. 17. This is not a quibble about whether a settled rule or legal framework was properly applied; it is a disagreement over what the framework means in the first place.

ing business in Texas. See Pet App. 13a-14a, 15a, 63a-66a.

4. *The Imputation of MBNA's Contacts To Daimler-Benz AG.* Respondents argue that the Court of Appeals *in fact applied* the traditional "alter ego" factors long endorsed by the Texas courts. Opp. 25. That is refuted not only by the court's analysis, which ignores many of the traditional factors (despite stipulated facts showing that those factors were inconsistent with piercing the corporate veil, see Pet. App. 16a-17a, 24a), but also by the court's endorsement of a special (and more lenient) standard for veil-piercing in the jurisdictional context under which "the operative question" is simply whether MBNA was a "mere 'division' or 'branch'" of a larger corporate family. *Id.* at 17a & n.5. Contrary to respondents' contention, this language was not dicta. Finally, the argument based on *Cannon* was not waived below. As respondents admit (Opp. 24-25), Daimler-Benz AG cited *Cannon* in the lower court in arguing that MBNA's contacts could not be imputed.

5. *Fair Play and Substantial Justice.* Here again, respondents fault Daimler-Benz AG for not calling attention below to the divergence between the factors employed by the Texas courts and the factors used in other jurisdictions (see Pet. 22-24) for evaluating whether the assertion of *in personam* jurisdiction comports with fair play and substantial justice. Opp. 25-26. That criticism is unfounded because the Texas Supreme Court has *already* specified the relevant factors that must be applied in the Texas courts. See Pet. App. 26a (citing *Guardian Royal*). The Court of Appeals was not free to disregard that mandate.[9]

Equally mistaken is respondents' speculative claim that this issue is not properly presented because "there is no way to tell whether the record in this case will be adequate to address the issues." Opp. 26. Respondents overlook the fact that the competing approaches of the Eighth and Eleventh Circuits involve consideration of *some but not all of the same factors* used in Texas. See Pet. 23. Although the Ninth Circuit uses *additional*

---

[9] Respondents do not deny that the Court of Appeals' analysis of certain of these factors was inconsistent with this Court's decision in *Asahi*. Pet. 23-24. That alone warrants this Court's review.

factors, they turn on legal analysis rather than historical facts.[10]

D. Contrary to respondents' contention, this case is an *unusually good* vehicle for addressing the pervasive confusion in the law of personal jurisdiction. There is a substantial need for this Court's guidance on the scope of general jurisdiction. Pet. 9-12. The lower court's reliance on several different factors provides an ideal setting in which to examine the nature of the "contacts" required for the assertion of general jurisdiction. Moreover, several of the individual considerations relied on below – including petitioner's Internet website and the imputation to Daimler-Benz AG of the activities of its indirect subsidiary – raise important doctrinal issues that have sharply divided the lower courts. As if that were not enough, the facts of this case (involving a vehicle designed for a foreign market and never sold in the United States) create an ideal setting in which to address fundamental questions about the meaning not only of the "stream of commerce" theory but also of the defining feature of *specific* jurisdiction: the requirement that a plaintiff's claims "arise out of, or relate to" the defendant's forum contacts. This Court should not pass up this opportunity to clarify critical features of *both* general and specific jurisdiction.

III. The Decision Below Is Wrong

Respondents' modest effort to defend the assertion of general jurisdiction by the Texas courts (Opp. 26-30) merely confirms the error made below. Tellingly, respondents cannot bring

---

[10] Contrary to respondents' suggestion (Opp. 10), review should not be denied because two cases now pending in the Texas Supreme Court might somehow "affect petitioner's arguments" in an appeal years from now following entry of a final judgment. *American Type Culture Collection* involves a "comparative personal jurisdiction" theory not raised here. See 45 TEX. SUP. CT. J. 107, 115. *BMC Software* does not involve Internet contacts, trademark use, the stream-of-commerce theory, and other issues raised in this case. See 44 TEX. SUP. CT. J. 577, 578. Although *BMC Software* does involve the application of Texas's "fair play and substantial justice" factors, there is no indication that the Texas Supreme Court is being asked to depart from its settled approach in *Guardian Royal*. And the alter ego issue raised in *BMC Software*, which is not a product liability case, does not hinge on the terms of a distribution agreement or on language in annual corporate reports.

themselves to defend much of the analysis used by the Court of Appeals. And what they do say is clearly flawed. For example, the fact that the accident occurred in Texas is obviously not a "contact[] with Texas" (Opp. 26) on the part of Daimler-Benz AG, any more than this lawsuit is. Daimler-Benz AG's long-standing practice of maintaining worldwide insurance for product liability claims does not reflect any expectation of being sued in Texas (or for that matter in Afghanistan) – especially on claims involving car models never even sold in the forum.[11] And the placement of *other products* into a stream of commerce flowing into Texas (Opp. 26-27) does not qualify as "continuous and systematic" activities *within* the State, as is required for the assertion of *general* jurisdiction. Pet. 12, 25. Nor does the use of a trademark or the maintenance of a passive website not specifically directed at Texas consumers. Although respondents suggest (Opp. 28) that the decision below could be upheld on the basis of *specific* jurisdiction,[12] they fail to address any of the criticisms that have been leveled (see Pet. 29-30) against the far-reaching "substantial connection" test on which they rely.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

---

[11] The *Baker* case (Opp. 27 & n.2), in contrast, involved a car designed for the U.S. market. As the language omitted from respondents' quotation shows, Daimler-Benz AG's interrogatory answer was limited to other lawsuits involving "vehicles not intended for sale in the United States." CR 150.

[12] Contrary to respondents's submission (Opp. 28 & n.3), they did not argue in the trial court that specific jurisdiction could be upheld on the ground that the 500SE's gas tank created the same risk as other models of Mercedes vehicles sold in Texas. In fact, respondents never pleaded which defect they were claiming, or even whether it was a manufacturing or design defect. This argument was raised or the first time during oral argument in the Court of Appeals, as respondents acknowledged below. See Resp. Post-Submission Ltr. Br. 4 (noting that "Justice Smith first raised this point" at oral argument). Although respondents may certainly press the argument in this Court if review is granted, it is *not* true that Daimler-Benz AG bore the burden of *disproving* this (or any other) unpleaded theory of jurisdiction. See note 4, *supra*.

JUSTS N. KARLSONS
DAVID M. RICE
MATTHEW J. KEMNER
Carroll, Burdick & McDonough LLP
44 Montgomery Street
Suite 400
San Francisco, CA 94104
(415) 989-5900

JOE R. GREENHILL
Baker Botts, L.L.P.
98 San Jacinto Blvd.
Suite 1600
Austin, TX 78701-4039
(512) 322-2500

ALAN E. UNTEREINER*
ROY T. ENGLERT, JR.
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

APRIL 2002